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April 20, 2009

Tukwila City Council
City of Tukwila
6200 Southcenter Blvd.
Tukwila, WA 98188

Re: April 20, 2009 Public Hearing on Shoreline Master Program

Dear City Council Members:

We represent Innkeepers USA, the owner through its subsidiary, Grand Prix Tukwila LLC, of the Residence Inn hotel property located at 16201 West Valley Highway in the City of Tukwila. We are writing to provide comments on the proposed Shoreline Master Program Update ("SMP Update") under consideration by the City Council.

The Tukwila Residence Inn by Marriott is located on an approximately 8.15-acre property along the east side of the Green River immediately north of Strander Boulevard. It was developed in the 1980's under existing City SMP provisions. The Residence Inn consists of 144 newly renovated extended stay suites in 18 two-story buildings along the narrow riverfront property. It is the only extended stay hotel in the City of Tukwila.

The Residence Inn property is designated Urban Conservancy in the SMP Update. Its underlying zoning is Tukwila Urban Center. As is evident from the attached aerial photograph, nearly the entire Residence Inn property and hotel development is within the City's shoreline jurisdiction and will be subject to and substantially affected by the proposed SMP Update under consideration by the City Council.

During the Planning Commission's review of the SMP Update, Innkeepers submitted written comments and testified at Planning Commission hearings with its concerns about the impact the proposed SMP provisions would have on the Residence Inn property. While some of these concerns have been addressed in the February 5, 2009 Planning Commission Recommended Draft SMP, a number of substantial concerns remain. They are addressed below by relevant subject matter.

EXHIBIT 6 DATE 4-20-09
PROJECT NAME _____
FILE NO _____
Council Review SMP
Update L06-088

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1. River Buffer

Of particular concern to Innkeepers is the increase in the buffer on the Residence Inn property from 40 feet to 100 feet. The increased buffer cuts through the middle of the existing hotel development, placing half of the buildings inside the buffer. Consequently, it would cause the current uses and improvements on the property to become nonconforming and make it virtually impossible to redevelop the existing hotel property to its current use or to any other commercially viable use currently allowed by the underlying zoning on the property.

For commercially-developed, non-leveed riverfront properties like the Residence Inn property, which have stable, vegetated buffers of 40 feet or more, there is no demonstratable need or basis to impose a 100-foot buffer in order to protect shoreline functions and values. Instead, like the buffers imposed for the similarly situated residential properties along the river, a 50-foot buffer is more than sufficient to ensure no net loss of shoreline functions and values and should be the maximum buffer imposed on properties such as the Residence Inn property. If any wider buffers are imposed, the SMP should at least allow commercially developed properties such as the Residence Inn property to obtain a reduction in the buffer upon a showing that the reduction would not adversely affect shoreline functions and values. Such an approach is consistent with the SMP goal of ensuring no net loss of shoreline functions and values.

In contrast, the proposed SMP Update does not provide any practical relief from the devastating effects that a 100-foot buffer would have on a narrow, commercially developed riverfront property such as the Residence Inn property, with little room to redevelop landward of the buffer. While the proposed SMP Update contains provisions that would allow the buffer to be reduced by up to 50% if the property owner, among other things, reslopes the bank to 2.5:1, provides a 20-foot setback from the top of the new slope and vegetates both the river bank and the 20-foot setback area in accordance with the vegetation and landscape requirements in the SMP, these provisions are not likely to provide much relief from the 100-foot buffer for a property such as the Residence Inn property since the width of the 100-foot buffer was established in the first place to allow enough room to reconfigure the riverbank to achieve the 2.5:1 slope. Thus, if anything, the buffer reduction provisions underscore the true rationale for the 100-foot buffer in the proposed SMP Update, which is to require private property owners to bear the entire cost and burden of resloping the bank for flood control purposes, not to protect shoreline functions and values as required by the Shoreline Management Act.

The one-size-fits-all 100-foot buffer imposed on the Residence Inn property by the SMP Update is neither justifiable nor reasonable, especially for narrow, commercially zoned and developed riverfront properties with existing, fully functioning vegetative buffers and little room to redevelop landward of the buffer. Such properties should either be subject to a maximum buffer of 50 feet or provided with the flexibility to have their buffer reduced to 50 feet if it can be accomplished without adversely affecting shoreline functions and values. To impose the 100-foot buffers proposed by the SMP Update will cause the current use of the Residence Inn

property to be deemed nonconforming, a status that is not favored under Washington law and which can have significant adverse effects on property value, redevelopment potential, and the ability to obtain credit and insurance, among other effects – a circumstance that is especially troubling in this current economic climate.

2. Vegetation Protection and Landscaping

The SMP Update requires installation and maintenance of substantial, expensive revegetation and landscaping, both within and outside of the river buffer. SMP, §9.10. It does so without any consideration of the need for such requirements based on the impacts of development, or whether such required improvements are roughly proportional or reasonably necessary as a direct result of the project impacts. As a result, imposition of such requirements on certain development activities could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761, 49 P.3d 867 (2002) (“development conditions must be tied to a *specific, identified impact* of a development on the community.”); RCW 82.02.020 (Exaction is unlawful tax or fee unless City meets burden of establishing that development conditions are reasonably necessary as a direct result of the proposed development); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App. 649, 187 P.3d 786 (2008) (King County's clearing limits in critical areas ordinance violate RCW 82.02.020 because not proportionally related to proposed development); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show “essential nexus” between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is “roughly proportional” to the impacts of the proposed development). Further, they purport to impose development conditions to “relieve a preexisting deficiency,” which is clearly unlawful. *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002).

To address these concerns, the City should revise Section 9.10 to ensure that any vegetation protection and landscaping requirements imposed on development are proportional to the impacts of such development, as required by RCW 82.02.020 and state and federal constitutional law.

3. Nonconforming (“Pre-Existing”) Development

Section 14.6 address many of the concerns raised by Innkeepers during the Planning Commission proceedings, especially those relating to reconstruction and replacement of nonconforming (“pre-existing”) structures that are nonconforming simply because they will now be located within the substantially wider, no-activity buffer established in the SMP Update. One critical concern remains however: the loss of a property's nonconforming use status where a pre-existing use of a structure is changed to another use, even if the new use is permitted by the underlying zone. There is no defensible basis to cause a property that is nonconforming by

virtue of having an existing structure wholly or partially within the shoreline buffer to lose its nonconforming status simply because the pre-existing use of a structure changes to a use permitted by the underlying zoning of the property. The language in Section 14.6(A)(4) should be amended to allow a change of use from one nonconforming use to another for a structure wholly or partially within the shoreline buffer, so long as the use is permitted by the underlying zoning for the property.

4. Public Access

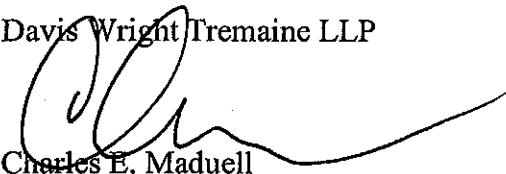
Like the vegetation protection and landscaping requirements, the public access requirements require extensive and expensive public access improvements for relatively minor development or redevelopment. Under Section 11, the extent of the public access improvements that must be installed and dedicated do not vary based on the need for such requirements to mitigate the impacts to public access from development, or whether such required improvements are roughly proportional to or reasonably necessary as a direct result of the project impacts. Thus, imposition of such requirements on certain development activities could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020.

To address these concerns, Section 11 of the SMP Update should be revised to ensure that any public access requirements imposed on development are reasonably necessary as a direct result of, and roughly proportional to, the impacts of such development on public access, as required by RCW 82.02.020 and federal and state constitutional requirements. *See cases cited in Section 2, above.*

Thank you for your consideration of these comments.

Very truly yours,

Davis Wright Tremaine LLP



Charles E. Maduell

cc: Eric L. Kentoff, Esq.

Enclosure

